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Re-engineering the Insolvency and Bankruptcy Code in Light of Section 29A

■ Sachin Gupta & Pragya Khaitan



Insolvency and Bankruptcy Code (IBC) is a legislation that has been evolving with various amendments since its enactment. One such amendment is the

introduction of Section 29A by way of ordinance dated 23rd November 2017. Prior to this, there was no bar on the eligibility of the resolution applicant. This led to an open-ended platform for even defaulters to bid for the assets of a company undergoing Corporate Insolvency Resolution Process (CIRP) subsequently leading to an undue advantage of the provision, which would defeat the very purpose of IBC. Thus, in order to curtail the same, section 29A was introduced. Section 29A is a restrictive provision, which specifically lists down the persons who are not eligible to be resolution applicants.

Section 29A states that a person shall not be eligible to submit a resolution plan, if such person, or any other person acting jointly or in concert with such person –

1. Is an undischarged insolvent;
2. Is a wilful defaulter in accordance with the guidelines of the RBI issued under the Banking Regulation Act, 1949;
3. Has an account, or an account of a corporate debtor under the management or control of such person or of whom such person is a promoter, classified as a non-performing asset in by the RBI and at least a period of 1 year has lapsed from the date of such classification;

Provided that the person shall be eligible to submit a resolution plan if such person makes payment of all overdue amounts with interest

thereon and charges relating to non-performing asset accounts before submission of resolution plan;

4. Has been convicted for any offence punishable with imprisonment for 2 years or more;

5. Is disqualified to act as a director under the Companies Act, 2013;

6. Is prohibited by the SEBI from accessing the securities markets;

7. Has been a promoter or in the management or control of a corporate debtor in which a preferential transaction, undervalued transaction, extortionate credit transaction or fraudulent transaction has taken place and in respect of which an order has been made by the Adjudicating Authority under this Code;

8. Has executed an enforceable guarantee in favor of a creditor in respect of a corporate debtor against which an application for insolvency resolution made by such creditor has been admitted under this Code;

9. Has been subject to any disability, corresponding to clauses (1) to (8), under any law in a jurisdiction outside India; or

10. Has a connected person¹ not eligible under clauses (1) to (9)².

This was an attempt to tighten the bidding and evaluation process, to keep dishonest promoters and people who have gamed the system out from acquiring back the assets at a steep discount including the ex-promoters, key managerial persons (KMPs) and their relatives. This narrative seems to be based on a moralistic ground to allow only 'Clean and Credible people' to run businesses in India and keep others, who have been responsible



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for bringing the borrower to this state, out of the process. As mentioned earlier, before section 29A was introduced, even the people (promoters, directors, connected person(s) etc.) who had contributed to the downfall of the corporate debtor were eligible to bid for the corporate debtor at a heavy discount causing the creditors (financial and operational) to take a sizeable haircut.

Though the purpose of section 29A under the Ordinance was well intended the net it cast was too wide. Further, if one goes into the definition of Wilful

Defaulter, it covered not only the dishonest promoters but a host of other genuine promoters, KMPs and connected persons who come under this tag due to technical defaults. With the aim to streamline the provisions of Section 29A, the Insolvency and Bankruptcy Code Amendment (Ordinance) 2018 was introduced on 6th June 2018, wherein the following amendments were implemented:

(a) The Ordinance does not disqualify the promoter from bidding for his company undergoing CIRP, as long as he

is not a wilful defaulter and does not permit disqualification in any other manner, in the case of MSME.

(b) The Ordinance does not disqualify financial entities, including asset reconstruction companies ("ARC"), financial institutions functioning overseas, alternative investment funds, scheduled banks, registered foreign portfolio investors and foreign venture capital investors, who are not associated with the corporate debtor.

(c) The Ordinance does not disqualify

¹The "connected person" means—

(i) any person who is the promoter or in the management or control of the resolution applicant; or
(ii) any person who shall be the promoter or in management or control of the business of the corporate debtor during the implementation of the resolution plan; or
(iii) the holding company, subsidiary company, associate company or related party of a person referred to in clauses (i) and (ii);

²Related Party shall not include a financial entity, regulated by a financial sector regulator, if it is a financial creditor of the corporate debtor and is a related party of the corporate debtor solely on account of conversion or substitution of debt into equity shares or instruments convertible into equity shares, prior to the insolvency commencement date



the guarantor of a corporate debtor unless the guarantee after enforcement remains unpaid.

(d) The Ordinance does not disqualify entities who have acquired a corporate debtor with an NPA in the past by virtue of an earlier insolvency resolution process for a period of three years.

(e) The Ordinance does not disqualify those financial creditors who are regulated but are affiliated to the corporate debtor simply due to their equity holdings resulting from a debt restructuring scheme prior to the initiation of CIRP.

The impact of Section 29A could be seen in a few high-profile cases which were in news frequently. Numetal which has the scion of the Ruia family as its helm and 25% stake being owned by the Aurora Trust of the Ruia family was disqualified from bidding for Essar Steel. ArcelorMittal was also restricted from bidding for Essar Steel as it was contended that ArcelorMittal was holding shares in companies like Uttam

Galva Steel and KKS Petron whose loan account had been declared as NPA. The bidding race for Ruchi Soya is another example where the two participants Patanjali and Adani Wilmar were neck to neck till Patanjali contended that the wife of the promoter of Adani Wilmar was the daughter of the promoter of Rotomac, which is a loan defaulting entity. It is clear that in both cases the Resolution Applicant was hit by the provisions of Section 29A.

This regulatory and legislative re-engineering of IBC by introducing section 29A and the Insolvency and Bankruptcy Code Amendment (Ordinance) 2018 have given adequate protection to genuine resolution applicants who have suffered due to macroeconomic and external factors, errors of policy, systematic fault lines in the economy and financial sector et al. This amendment has balanced the interest of all stakeholders and ensured maximization of the value of assets of the Corporate Debtor in line with the scope and object of the Code. [\[1\]](#)



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